HHB-CV-19-6056021-S	SUPERIOR COURT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES	JUDICIAL DISTRICT OF NEW BRITAIN
v.	AT NEW BRITAIN
EDGE FITNESS, ET AL.	MARCH 31, 2020

BRIEF OF THE PLAINTIFF
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

The Commission on Human Rights and Opportunities ("Commission") "must strictly comply with the governing statutes and the regulations it has caused to be issued." Groton v. CHRO, 169 Conn. 89, 100 (1975). Conn. Gen. Stat. § 46a-64(a) states that it "shall be a discriminatory practice… [t]o deny any person… full and equal accommodations in any place of public accommodation… because of… sex… [or] to discriminate, segregate or separate on account of… sex".

There is no dispute that Edge Fitness, LLC ("Edge Fitness") and Club Camel Inc. Bloomfield d/b/a Club Fitness ("Club Fitness") (collectively, the "Gym Defendants") are places of public accommodation. Record, 7. Nor is it disputed that they maintain workout areas exclusively for women, from which men are excluded solely on the basis of their sex. Id.. The only remaining question for the Commission's Referee was whether that constitutes a denial of full and equal accommodations or is otherwise discriminatory. Id. By the plain language of § 46a-64(a), the answer should have been yes.

The Referee concluded otherwise. In doing so she rendered a decision that was in violation of statute, in excess of statutory authority, premised on unlawful procedure, affected by error of law, and clearly erroneous in view of the record. See Conn. Gen. Stat. § 4-183(j). This appeal should therefore be sustained.

I. STATEMENT OF FACTS

Daniel Brelsford and Alex Chaplin each filed complaints with the Commission alleging, respectively, that Edge Fitness and Club Fitness discriminated against him on the basis of his sex (male) in violation of Conn. Gen. Stat. § 46a-64(a) by offering a separate workout area exclusively for women. Record, 711-14, 664-67.

Each complaint was sent to public hearing pursuant to Conn. Gen. Stat. § 46a-83(e).[1] Id., at 710, 663. Contested case proceedings began, and Chief Human Rights Referee Michele Mount was appointed to preside. Id., at 705, 668. In January of 2018, a decision was made to track the remaining deadlines of the cases together and hear them both at the same time. Id., at 592-93. Evidence was closed and hearings concluded in January of 2019. Id., at 1240.[2]

The Referee issued a consolidated decision on October 17, 2019. Id., at 1. In it, she found that Edge Fitness and Club Fitness each offered a separate workout area exclusively for women. Id., at 2, 4. Nevertheless, the Referee concluded that such a practice did not violate Conn. Gen. Stat. § 46a-64(a). Id., at 18. This appeal followed.

II. STANDARD OF REVIEW

Judicial review of an agency's action is governed by the Uniform Administrative Procedure Act ("UAPA"), which requires that a reviewing court sustain the appeal and

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[1] Conn. Gen. Stat. § 46a-83(e) states, in relevant part: "If the complaint is not resolved after the mandatory mediation conference, the complainant, the respondent or the commission may… request early legal intervention. If a request for early legal intervention is made, a commission legal counsel shall determine… whether the complaint should be (1) heard [at public hearing] pursuant to section 46a-84, (2) [investigated] pursuant to subsection (f) of this section, or (3) released from the jurisdiction of the commission."

[2] By which time more than 2 years had elapsed since Mr. Brelsford filed his complaint, and nearly 3 years had elapsed for Mr. Chaplin. See Conn. Gen. Stat. § 4-180(a) (agency must proceed with reasonable dispatch to conclude any matter pending before it").

take appropriate action where it finds that an agency has acted

> (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Conn. Gen. Stat. § 4-183(j). "[F]or conclusions of law, [t]he court's ultimate duty is… to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." Maturo v. State Employees Ret. Comm'n, 326 Conn. 160, 171 (2017). A pure question of law invokes an even broader standard; Angelsea Productions, Inc. v. CHRO, 236 Conn. 681, 688 (1996); under which the court may reverse an agency decision that "evinces an 'error of law.' General Statutes § 4–183(j)(4). The [reviewing] court need not defer to an incorrect decision of law by the agency." Bd. of Ed. of Ridgefield v. Freedom of Info. Comm'n, 217 Conn. 153, 159 (1991).

Where factual findings are challenged, a reviewing "court [must] determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." Adriani v. CHRO, 220 Conn. 307, 315 (1991). "An administrative finding is supported by substantial evidence [only] if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred." Goldstar Medical Servs., Inc. v. Dept. of Social Servs., 288 Conn. 790, 833–34 (2008).

III. SEPARATE ACCOMMODATION IS NOT EQUAL ACCOMMODATION.

"Although no private organization is duty-bound to offer its services and facilities to all comers, once such an organization has determined to eschew selectivity, under our

statute it may not discriminate among the general public." Quinnipiac Council v. CHRO, 204 Conn. 287, 298 (1987). This fundamental proscription accords with the purpose of laws prohibiting discrimination by places of public accommodation, which is to remedy "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." Heart of Atlanta Motel, Inc. v. U. S., 379 U.S. 241, 291 (1964) (Goldberg, J., concurring). Civil rights laws exist for "the vindication of human dignity and not mere economics", for discrimination

> is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [protected class]. It is equally the inability to explain to [him] that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

Id., at 291-92. It is with these principles in mind that the people of Connecticut and their legislators have demonstrated "a firm commitment not only to end discrimination against women, but also to do away with sex discrimination altogether." Evening Sentinel v. Nat'l Org. for Women, 168 Conn. 26, 34 (1975).

Precedent makes clear that the Gym Defendants' practice of maintaining a "separate but equal" area of their facilities is unlawful. The first case which directs us to that conclusion is Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954), in which the United States Supreme Court repudiated the long-held notion that separate can still be equal. While that decision was concerned primarily with public education, the holding and reasoning of the Court finds equal traction here: "[I]n the field of [public accommodations] the doctrine of 'separate but equal' has no place. Separate [workout] facilities are inherently unequal." Id., at 495.

After Brown the United States Supreme Court continued to dismantle the "separate but equal" doctrine in a variety of contexts. Only a week later it vacated a decision upholding segregated parks and remanded it for consideration in light of Brown. Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954). Segregated municipal golf courses were similarly struck down; Holmes v. City of Atlanta, 350 U.S. 879 (1955); as were municipal swimming and recreation areas; Mayor & City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955). In 1956, the Montgomery Bus Boycott and its resulting lawsuit set the stage for the Supreme Court to affirm the end of privately-owned buses having separate sections based on color. Gayle v. Browder, 352 U.S. 903 (1956). These are but a few examples; the case reporters are replete with others.

Twenty years would pass before the holding of Brown would be expressly acknowledged by the Connecticut Supreme Court, appropriately in affirmation of a public hearing decision by the Commission on Human Rights and Opportunities.[3] In Evening Sentinel, the Court not only relied on Brown for the principle "that there can be no such thing as separate but equal", it did so in support of its conclusion that the segregation of private opportunities based on sex was a violation of the Connecticut antidiscrimination statutes. Evening Sentinel, 168 Conn. at 29.

Crucially, the fact that Brown had until then been used to strike down separations based on race and color did not impede the Connecticut Supreme Court from applying it to separations based on sex. As the Court reasoned, "[t]here is no indication in the text

[3] This is not to say that Brown had not already had a profound legal impact on Connecticut. "When the convention delegates debated the desirability of [equal protection] amendments to our state constitution, they recognized and endorsed the landmark decision in Brown… declaring the unconstitutionality of 'separate but equal' public school education." Sheff v. O'Neill, 238 Conn. 1, 30 (1996).

of [the statute] which would permit classification based upon sex to be treated differently than classifications based upon race, religion, age, national origin or ancestry." Id. This equality among protected classes was reaffirmed 3 years later when the Court held that physical disability, while not a protected class at the time of Evening Sentinel, should nevertheless be treated similarly following its inclusion in the statutes. Connecticut Inst. for the Blind v. CHRO, 176 Conn. 88, 95 (1978).

By recognizing that prohibitions on racial segregation were equally applicable to segregation based on sex, Evening Sentinel cemented Connecticut's position near the head of the national curve. Indeed, the United States Supreme Court did not make the equal aim of these protections explicitly clear in the public accommodations context until 1984. See Roberts v. US Jaycees, 468 U.S. 609 (1984) (drawing direct parallel between the denial of equal accommodation based on race and the sex). In the intervening years, Connecticut, like many other states, "has progressively broadened the scope of its public accommodations law in the years since it was first enacted, both with respect to the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden." Id., at 624; see Quinnipiac Council, 204 Conn. at 296 ("our public accommodation statutes have repeatedly been amended to expand the categories of enterprises that are covered and the conduct that is deemed discriminatory.").

Policies and practices which provide "separate but equal" facilities based on sex continue to be held discriminatory. In Corcoran v. German Social Society Frohsinn, Inc., Docket No. CV-02-0562775-S, 2008 WL 642659 (Conn. Super. Ct. Feb. 21, 2008), the plaintiff began visiting the defendant social club on a weekly basis as a guest. Id., at *1. While members and guests alike could utilize and rent an upstairs event space, guests

could only utilize a lower-level bar area if sponsored by a member. Id. Women were not permitted to be members of the club, as the plaintiff found when she attempted to join. Id. Consequently, the only individuals who could freely use the bar area without being sponsored were the all-male members of the club. Id. Regardless of the fact that women could freely access the club's event space as much as men could, and could still access the bar if sponsored by a member, the court found against the club, and enjoined its discriminatory practice. Id., at *6-7.

In a similar case – Albright v. Southern Trace Country Club of Shreveport, Inc., 879 So.2d 121 (La. 2004) – the Louisiana Supreme Court held that women could not be excluded from a male-only section of an otherwise mixed-sex country club.[4] There the space in question was a "Men's Grille" which, while not the only restaurant in the club, was at certain times the only dining area open. Id., at 125-26. The court rejected various "justifications" offered by the defendant club in support of its men-only dining area. Id., at 135-36 (rejecting economic and policy-based defenses). The court also concluded, citing to Roberts, 468 U.S. at 625, that the defendant's "exclusionary policy [was] based on an inaccurate, stereotypical depiction of male behavior", which even under a statute "designed to compensate for and ameliorate the effects of past discrimination" could not justify the practice of sex segregation in the public sphere. Id., at 137.

Like Corcoran and Albright, men and women alike can utilize many of the workout facilities and fitness services which the Gym Defendants offer. Like Corcoran and

[4] Because of Louisiana's unique legal system, the analysis used by the Louisiana Supreme Court in Albright is a hybrid application of a constitutional prohibition on gender discrimination to conduct by a private entity. See, e.g., id., at 133. The court's discussion of prima facie elements and impermissible justifications for discrimination nevertheless echo the similar analyses utilized in many of the other cases which have been discussed.

Albright, however, individuals of one sex are denied access a particular area of the Gym Defendants' premises on the same terms as members of another sex. Like access to food and drink in Albright, which on Sundays was only available in the Men's Grille, the workout machines offered by the Gym Defendants may generally be available to individuals regardless of sex, but when the facility is busy women can access an additional area while men cannot. As in Corcoran and Albright, then, the Gym Defendants' practice unlawfully discriminates on the basis of sex.

IV. THE REFEREE ERRED IN APPLYING A "CUSTOMER GENDER PRIVACY" DEFENSE.

Faced with unambiguous statutory text and more than 65 years of state and federal precedent, the Referee took a different route to her desired end: she applied an affirmative defense – that of "customer gender privacy" – with no basis in Connecticut law, and which at least one of the Gym Defendants failed to plead. See Record, 11. This was a prejudicial error of law that warrants reversal.

A. "Customer Gender Privacy" is Not a Valid Defense in Connecticut.

The Referee and Gym Defendants relied heavily on Livingwell (North) Inc. v. Penn. Human Relations Comm'n, 606 A.2d 1287 (Pa.Cmwlth 1992); Record, 11; which appears to be the earliest case to specifically consider the issue of a women's-only space in the fitness context. At issue in Livingwell was the permissibility of a women's-only health facility under the Pennsylvania Human Relations Act. The defendant health facility argued categorically that women had a right to exercise in an all-female environment, justified by the concept of a public accommodations BFOQ. Id., 119-20. The intermediate court agreed, but for reasons that made the decision wholly inapplicable here.

First, the section of the Pennsylvania statutes prohibiting discrimination by places of public accommodation – 43 Pa. Stat. § 955 – is the same section which prohibits discrimination in employment.[5] The text of the statute commences with a far-reaching exception: "It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification…." This exception is not limited in the subsections to which it applies. The Pennsylvania intermediate court accordingly emphasized this broad statutory BFOQ exception; Livingwell, 606 A.2d at 119; and bookended its discussion of privacy rights with BFOQs in mind. Id., at 130.

By contrast, Connecticut's BFOQ exception is limited to the statutes prohibiting discrimination in employment. See Conn. Gen. Stat. § 46a-60 (prohibiting various discriminatory practices "except in the case of a bona fide occupational qualification or need"). "No such qualification is expressly provided in General Statutes § [46a-64]. Quinnipiac Council, 204 Conn. at 293 n.6. It is "especially significant that only the former statute contains an express exception for a [BFOQ]…. The absence of a statutory exception for a [BFOQ] in the text of § 46a-64(a) is more consistent with a legislative intent to leave [BFOQs to] statutes that address employment discrimination rather than [to] statutes directed to discrimination in public accommodations." Id., at 302. See Trinity Christian Sch. v. CHRO, 329 Conn. 684, 697 (2018) ("[When] a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject... is significant to show that a different intention existed."). If the Connecticut legislature had wished to enact a public accommodations

[5] Subsections (a) through (g) of 43 Pa. Stat. § 955 cover discrimination in employment, subsection (h) housing, and subsection (i) public accommodations.

BFOQ, as Pennsylvania has, it certainly knew how, and has had 70 years to do so.[6] The Referee was therefore wrong to conclude that "[t]he Connecticut Public Accommodation Statute may not contain the BFOQ exception, however, that defense is still valid to a claim of discrimination" by a place of public accommodation. Record, 11.

The second underpinning of Livingwell which renders it inapplicable here is the absence in Pennsylvania's public accommodation statute of an exception for bathrooms or locker rooms. See 43 Pa. Stat. § 955(i). Despite acknowledging that all prior precedent with regard to a sex-based privacy BFOQ arose in the employment discrimination context,[7] the intermediate court was given the means to its desired end by the Pennsylvania Human Relations Commission, which was forced to concede that "where there is a distinctly private activity involving exposure of intimate body parts, there exists an implied bona fide public accommodation qualification which may justify otherwise illegal sex discrimination." Livingwell, 606 A.2d at 1291. "Otherwise," in Pennsylvania at least, "sex segregated accommodations such as bathrooms, showers and locker rooms, would have to be open to the public." Id.

The Connecticut Commission on Human Rights and Opportunities need not make such a concession. Our state's public accommodation statute has included a limited exception for sex-separated "bathrooms or locker rooms" since 1994, two years after Livingwell. See Public Act 94-238. While the Pennsylvania intermediate court may not

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[6] See CHRO ex rel. McKinney, v. Town of Glastonbury, CHRO No. 1140156, 2015 WL 500368, *6 (Jan. 16, 2015) (BFOQ exception "was included in the state's first employment discrimination law enacted in 1947 and… remains in section 46a-60 today.").

[7] The court also acknowledged that these prior cases centered largely on "customer preference", a concept which it noted could not be advanced as a defense to a charge of discrimination. Livingwell, 606 A.2d at 1289. The court was therefore forced to reframe "customer preference" as "customer gender privacy". Id., at 1289-90.

have been constrained by the text of its statute, the Connecticut Supreme Court has made clear that "[w]here express exceptions [in a statute] are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute." Gay & Lesbian Law Students Ass'n v. Bd. of Trustees, 236 Conn. 453, 476 (1996). Contrary to the conclusion of the Referee; see Record, 13; the text of Connecticut's statutory exception, which does not extend beyond bathrooms and locker rooms, is what governs. With no evidence in the record to suggest that the women's-only areas are themselves bathrooms or locker rooms, the exception is wholly inapplicable.

In the 27 years since Livingwell was decided, courts have regularly curtailed its reach. In Pennsylvania itself, a formerly single-sex school asserted Livingwell "for the proposition that exclusion of men does not violate the Pennsylvania Human Relations Act." Pottstown Sch. Dist. v. Hill Sch., 48 Pa. D.&C. 4th 365, 371 (Com. Pl. 2000), aff'd, 786 A.2d 312 (Pa. Commw. Ct. 2001). The trial court, addressing the tax-exempt status of the school, distinguished Livingwell as addressing "a narrow exception to the Human Relations Act, situations in which, due to modesty, persons would find it uncomfortable to have the opposite sex present." Id. The trial court went on to state that, if relevant at all, Livingwell only "would relate to locker rooms and bathing facilities." Id. Noting that the Pennsylvania Human Relations Act – which contains an express BFOQ – was inapplicable, the trial court made no mention of any BFOQs regarding the issue it was addressing. Notably, the same Pennsylvania intermediate court which issued Livingwell affirmed the trial court's decision, inclusive of its limitation on Livingwell's applicability. Id.

Other decisions demonstrate the ways in which Livingwell's unprecedented characterization of the public accommodations BFOQ as a "gender privacy defense" has

been used as a sword. Still within Pennsylvania, students of a public school sought an injunction against the school district for its practice of permitting their transgender classmates – whom they characterized as "persons of the opposite sex" – to use bathrooms and locker rooms corresponding to their gender identity. Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 378 (E.D. Pa. 2017), aff'd, 890 F.3d 1124 (3d Cir. 2018), and aff'd, 897 F.3d 518 (3d Cir. 2018), cert. denied, 139 S. Ct. 2636 (2019). The plaintiff students used Livingwell to assert that this practice of inclusion "violate[d] their privacy even if intimate areas of their bodies are not exposed as even their (in particular, the girls') 'modesty' is protected from intrusion." Id. Neither the District Court for the Eastern District of Pennsylvania nor the Third Circuit felt the plaintiffs' arguments presented sufficient likelihood of success to warrant the injunction sought. Id., at 412.

In Ohio, the plaintiff in Messer v. Summa Health Systems claimed that she was discriminated against on the basis of sex, in part by being required to change into her medical scrubs in a unisex changing room. Messer v. Summa Health Sys., 105 N.E.3d 550, 556 (Ohio Ct. App. 2018), appeal denied, 103 N.E.3d 832 (Ohio 2018). While all employees were required to utilize the unisex changing room – which could be locked when in use – without regard to sex, the plaintiff relied on Livingwell "for the proposition that women have a heightened sense or right to privacy over men." Id., at 562. The Ohio Court of Appeals, disagreeing that Livingwell supported that proposition, limited Livingwell to its specific facts, and concluded that it had no application to the case before it. Id.

Even in instances where courts have cited Livingwell in support of their conclusions, they have done so in a limited way. The New Jersey intermediate court,

diving headlong into acceptance of customer preference as a defense to discrimination,[8] relied on Livingwell to describe the burden that a defendant would need to satisfy to demonstrate a BFOQ based on sex-based preference. Spragg v. Shore Care, 679 A.2d 685, 694-95 (N.J. Super. Ct. App. Div. 1996). Even there, the case dealt with sex discrimination in the context of employment and gave no indication that a sex-based customer preference defense would extend to public accommodations.

The most definitive contextualization for Livingwell's singular place in our nation's case reporters comes from our neighboring jurisdiction of Massachusetts. In Foster v. Back Bay Spas, Inc., 7 Mass. L. Rptr. 462, 1997 WL 634354, *1 (Mass. Sup. Ct. Oct. 1, 1997), summary judgment was sought against a women's-only fitness center for excluding men on the basis of sex in violation of the state's public accommodation statute. The court looked to Livingwell as a comparison, although it noted that Pennsylvania's public accommodations statute, unlike Massachusetts' (or Connecticut's), has a statutory BFOQ exception. Id., n.1. The court also pointed out that while Massachusetts has a statutory right to privacy, that right has never been held to include "exercising in a same-sex facility, even with the awkward and compromising positions the women must assume." Id., at *4. Livingwell was further distinguished in that "the cases relied upon by the Livingwell court all involve the exposure or the touching of intimate body parts. This case, on the other hand, involves exercising – an activity – performed before numerous

[8] Anomalous New Jersey decisions aside, customer preference has widely been rejected as a permissible justification for unlawful sex discrimination. See Evening Sentinel, 168 Conn. at 37 ("it would be totally anomalous… to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid"); Slayton v. Michigan Host, Inc., 376 N.W.2d 664, 669 (Mich. Ct. App. 1985) (defense "based upon a desire to compete in the industry, or customer preference, is discriminatory on its face").

other people, in full exercise attire…. No exercise position, performed while dressed, would result in the sort of exposure of intimate body parts which has been protected by the privacy right." Id., at *3. As a result of these distinctions, summary judgment against the fitness facility was granted. Id., at *4-5.

The Referee went out of her way to distinguish Foster, even going so far as to state that "[a]ny reliance on *Foster* is misplaced". Record, 14. The statement alone is remarkable in light of the Referee's heavy reliance on Livingwell, which is "factually identical" to Foster.[9] See Foster, 1997 WL 634354, at *3. It is also lacking in foundation. The Foster court did, as the Referee noted, identify the openness of the fitness center in considering the claim of customer gender privacy. Id. But this was one of many factors which led the court to conclude that no privacy rights were implicated, including the court's conclusion that "[n]o exercise position, performed while dressed, would result in the sort of exposure of intimate body parts which has been protected by the privacy right." Id., at *3-*4. Our Supreme Court has criticized a "revisionist understanding of [a decision's] reasoning" where there is inadequate support, either express or implied, for that understanding. CHRO v. Bd. of Ed. of Cheshire, 270 Conn. 665, 699 n.33 (2004).

The absence of a statutory public accommodations BFOQ and the presence of a statutory exception for bathrooms and locker rooms places Connecticut generally, and the present cases specifically, more in line with Foster than Livingwell. As several other courts have done, Livingwell should be confined to its facts. The unprecedented application in Livingwell of a customer preference defense in the guise of gender privacy should not have found its first expression through this case. Instead, the Foster court's

[9] Not to mention her reliance on Stopps, a Canadian case. Record, 12-13.

well-reasoned repudiation of Livingwell and thoughtful application of statute to facts should have guided the Referee's decision here. That it did not was a material error.

B. Edge Fitness Failed to Plead a "Customer Gender Privacy" Defense.

Not only should the "customer gender privacy" defense have been rejected as inapplicable in Connecticut generally, it should have been specifically rejected as a defense to Mr. Brelsford's complaint due to the failure of Edge Fitness to plead it. See Record, 701-04 (no defenses pled in Answer filed by Edge Fitness at public hearing).[10] The Referee's acceptance of evidence in support of the defense, as well as her application of the defense to defeat Mr. Brelsford's claim, were prejudicial errors of law.

"Pleadings have an essential purpose in the [adjudicative] process.... The purpose of pleading is to apprise the [tribunal] and opposing counsel of the issues to be tried…. It is imperative that the [tribunal] and opposing counsel be able to rely on the statement of issues as set forth in the pleadings…. As Justice Cardozo has written: justice, though due to the accused, is due to the accuser also…. Fairness is a double-edged sword and both sides are entitled to its benefits throughout the trial." (Internal quotation marks and citations omitted.) State v. Cooper, 64 Conn. App. 121, 125 (2001).

While "the formal requirements of pleading in civil actions filed in court do not apply to complaints filed with the commission"; Bd. of Ed. of Cheshire, 270 Conn. at 705; the Commission has enacted its own rules of practice through its regulations. Cohen v. CHRO, Docket No. HHB-CV-17-5018330-S, 2019 WL 624405, *9 (Jan. 11, 2019) ("the UAPA requires administrative agencies to develop their own rules of practice… [i]n this

[10] In stark contrast to Edge Fitness, Club Fitness *did* plead a special defense based on "their female customer's right to privacy"; Record, 608; albeit vaguely tied to unspecified "constitutional" principles, and without any facts pled in support.

case, the regulations"). Answers in public hearing proceedings are specifically governed by Regs. Conn. State Agencies § 46a-54-86a, subsection (b) of which makes clear that "[a]ffirmative defenses shall be specially pleaded or they shall be deemed waived."[11] Accord McIlwain v. Moser Farms Dairy, Inc., 40 Conn. Supp. 230, 232 (1985). ("The term 'shall' refers to a mandatory requirement."). Here, the Referee acknowledged the Commission's argument that the "customer gender privacy" defense could not be raised for want of being specially pled, but responded that because of her "broad powers to admit evidence" she was "not restricted to the four corners of the pleadings" and could "request[] that this issue be part of the hearing and briefed". Record, 11. In reality, the opposite is true.

Where an affirmative or special defense has been waived for lack of pleading, the trial tribunal may not itself raise, consider, or apply the defense to defeat an opposing claim. See, e.g., Diaz v. Comm'r of Correction, 157 Conn. App. 701, 706-07 (2015) (improper for trial court to raise and apply affirmative defense sua sponte); Howard-Arnold, Inc. v. T.N.T. Realty, Inc., 145 Conn. App. 696, 712 (2013) ("it is improper for a court, sua sponte, to apply an unpleaded special defense to defeat a… cause of action"), aff'd, 315 Conn. 596 (2015)**;** Oakland Heights Mobile Park, Inc. v. Simon, 36 Conn. App. 432, 436–37 (1994) ("It would be fundamentally unfair to allow any defendant… to await the time of trial to introduce an unpleaded defense. Such conduct would result in 'trial by ambuscade' to the detriment of the opposing party… [and] the trial court should not… consider[the defense]."). This is especially true of a defense like "customer gender privacy", which the Gym Defendants and the Referee have likened to the BFOQ, "an

[11] This regulation does, however, have an approximation in Practice Book § 10-50.

affirmative defense that the [asserting party] has the burden of proving". Curry v. Allan S. Goodman, Inc., 286 Conn. 390, 409 (2008). See, e.g., Record, 11; Edge's Obj. to CHRO Mot. to Strike (Docket #109.00), 6.

The decision of the Appellate Court in Comm'r of Mental Health & Addiction Servs. v. Saeedi, 143 Conn. App. 839 (2013), is particularly instructive. There, the respondents in public hearing proceedings failed to plead a particular defense,[12] and did not otherwise assert it until their post-hearing brief. Id., at 854. The Appellate Court deemed the defense waived, and declined to address its merits on appeal. Id., at 855. In doing so the Appellate Court explained that the respondents' delay in raising the defense

> not only... fail[s] to comport with the rules of practice, it fails to comport with a fundamental principle underlying those rules: the parties and the tribunal, as they embark on the trial process, are entitled to know definitively the scope of the legal and factual issues to be addressed during that trial. The [respondents] are not entitled to raise th[eir] defense only after the conclusion of the hearing before the referee….

Id., at 854.[13] Indeed, it made no difference that the respondents had technically "raised" the defense in their brief, since "bearing the burden of raising the defense in the first instance, they did not *timely* or *properly* raise it." (Emphasis in original.) Id., at 855 n.14.

The failure of Edge Fitness to plead "customer gender privacy" as a defense is no different than the failure of the respondents in Saeedi with regard to the statute of limitations: for both, the defense was waived by the failure of the respondent to plead it. It is too late to "raise" the issue in post-hearing briefing. See A Star Group, Inc. v. Manitoba Hydro, 621 Fed. Appx. 681, 683 (2d Cir. 2015) ("a party may not amend its pleadings

[12] Specifically, a statute of limitations defense. Saeedi, 143 Conn. App. at 854-55.
[13] While the "rules of practice" referred to in Saeedi were those of the Practice Book, which the more recent Cohen decision confirms do not apply; Cohen, 2019 WL 624405, at *9; the same principle holds under Regs. Conn. State Agencies § 46a-54-86a(b).

through statements in its briefs").[14] The "customer gender privacy" defense should have been deemed waived by Edge Fitness, and should not have been used by the Referee to impede Mr. Brelsford's claim.

C. The Referee Erred in Considering the Issue of Religious Accommodation.

While Edge Fitness failed to plead any defenses, Club Fitness did plead two, the second of which asserted that its women's-only workout area was "in facilitation of [its] female customer's right to privacy". Record, 608. There is no "fair reading" of that defense which would suggest that it encompassed concerns for religious rights or obligations; Cooper, 64 Conn. at 121; which likely explains why Club Fitness has, for the first time, specifically raised religious concerns in its Answer to this appeal. See Club Fitness' Answer and Special Defenses, 3 (asserting that workout area was "in facilitation of [its] female customers' rights to gender, religious and/or gender privacy").

It was not until the hearing – upon objection by the Commission to the introduction of a document related to a customer's religious beliefs as irrelevant in the absence of a defense based on religion – that Club Fitness first asserted that "privacy is encompassed by religious beliefs". Record, 1225-26. The Referee agreed with Club Fitness. Id. ("privacy encompasses privacy for many reasons, and it is a reason within privacy"). Notwithstanding the Commission's objection, the position of the Referee and Club Fitness was borne out in briefing: Club Fitness focused almost entirely on general "customer gender privacy" concerns without reference to religion, devoting only one sentence of

[14] A brief, after all, is by definition not a pleading. See, e.g., Antoine v. Elm City Communities, 63 Conn. L. Rptr. 943, 2017 WL 1194247, *2 (Conn. Super. Ct. Feb. 22, 2017) ("Motions, briefs and affidavits are… not *pleadings*. Examples of pleadings are complaints… and answers…. Pleadings are the documents setting forth a party's formal claim or defense based on particular factual allegations." (Citation omitted.)).

argument to religious considerations in its post-hearing brief, reply brief, and sur-reply brief combined. See Record, 143 ("In addition… a segment of the Respondent's female customers utilizes the women's-only space due to religious restrictions, an issue that goes well beyond a matter of mere customer preference to a sincere privacy need.").[15] Edge Fitness did not brief any arguments based on religious considerations at all.

Nevertheless, despite the pleadings, representations, and briefs, the Referee went beyond merely discussing religion as "a reason within privacy" with respect to Club Fitness alone. Id., at 1224-25. Instead, she concluded that without the women's-only workout areas

> many women would not exercise if forced into a co-ed environment and some would be forbidden to do so based on their religion. There have been accommodations for religious beliefs and practices in the areas of employment, also in dress and in prison. Providing this woman's area to the members who wouldn't otherwise be able to exercise in a co-ed environment is an accommodation to the customer's religious needs. Otherwise women members of certain religions would not have access to exercise facilities.

Id., at 17-18. Nowhere was it pled or argued that the women's-only section was being requested or offered as a religious accommodation. Nor, as has already been discussed, did Edge Fitness plead any defense such as could even remotely encompass religious considerations. In raising the issue of religious accommodation and basing her consolidated decision on such concerns, the Referee became "an advocate in the nature

[15] Had Club Fitness actually asserted a religion-based defense, this level of briefing would have been inadequate to save it from waiver. Artiaco v. Comm'r of Correction, 180 Conn. App. 243, 248–49 (2018) ("[c]laims are inadequately briefed when they are merely mentioned… not briefed beyond a bare assertion... [or] consist of conclusory assertions... with no mention of relevant authority and minimal or no citations from the record"). See also, Regs. Conn. State Agencies § 46a-54-93a ("presiding officer may deem the failure to brief any claim to be a waiver of said claim").

of the [defendants'] co-counsel," something which no tribunal can properly do. Dunning-Bellis v. Casey, Docket No. SPNH-97-0550793, 1997 WL 428684, *1 (Conn. Super. Ct. June 26, 1997). This was a prejudicial error of law which warrants reversal.

V. THE REFEREE IMPROPERLY ENGAGED IN POLICYMAKING.

"Administrative agencies and the courts are bound to enforce the laws as written…. Changes in those laws may be effected only by the action of the legislature." Foy v. Adm'r, Unemployment Comp. Act, 33 Conn. L. Rptr. 736, 2003 WL 431595, *1 (Conn. Super. Ct. Jan. 29, 2003) (Cohn, J.). The Referee usurped the legislative policymaking prerogative, creating by inference and implication a remedial privacy exception to our state's public accommodation statute that is belied by the statutory text.

Throughout her decision, the Referee made numerous references to policy considerations, often as a contrast to the prohibitions and exceptions clearly set out in the text of Conn. Gen. Stat. § 46a-64. For example, the Referee stated that

> The Public Accommodation statute in Connecticut sets out exceptions based on gender regarding accommodations such as bathrooms, sleeping accommodations and locker rooms; this evinces the intent of the legislature to consider gender privacy. The statute does not address, i.e., dressing rooms, lactating rooms, hospital rooms, battered women's shelters and rape crisis shelters, inter alia where gender privacy is considered. However, if we interpret General Statue § 46a-64 in the manner the Commission suggests, that it is "a per se violation" because an exercise area is not included in the statue, then every situation of customer gender privacy not set out in the statute will be swept out as per se discrimination. The statute contemplated gender rights of privacy when putting in obvious exceptions. The specific exceptions in the General Statute § 46a-64 do not preclude an analysis of whether the public policy regarding privacy and the remedial nature of the statute is applicable in situations other than those listed. Consequently, because the rationale and the policy reasons are the same, we will apply the same considerations to determine if a valid customer preference privacy right defense exists in response to charges of discrimination at a place of public accommodation.

Record, 13. The Referee therefore acknowledged that only "bathrooms, sleeping accommodations and locker rooms" are specifically exempted from the statute's prohibition on sex discrimination. In the absence of evidence showing that the women's-only sections are bathrooms or locker rooms, that should have been the end of the analysis. Instead, the Referee identified other areas where she supposed that sex-based privacy concerns might be implicated. She assumed perforce that sex discrimination in these areas should be justified,[16] and made the leap that "public policy regarding privacy and the remedial nature of the statute" must not only save these examples from the statutory prohibitions, but the women's-only workout spaces as well.

Courts are generally in agreement that statutory ambiguities "should be resolved in a manner that furthers, rather than thwarts, [an] act's remedial purposes. [Tribunals] are not free, however, to create ambiguity when none exists; in other words, [they] cannot accomplish a result that is contrary to the intent of the legislature as expressed in the [statute]'s plain language." (Internal quotation marks omitted.) Vincent v. City of New Haven, 285 Conn. 778, 791-92 (2008) (applying unambiguous statutory text despite conclusory argument that it would necessitate "harsh result… inconsistent with [statute's] humanitarian purposes"). There is no ambiguity in the text of the exception for "separate bathrooms or locker rooms based on sex". Conn. Gen. Stat. § 46a-64(b)(1). The Referee

[16] While not conceding the point, it is possible that a dressing room or battered women's shelter might, depending on the specific facts, be covered under the existing statutory exceptions for locker rooms (in the case of the former) or sleeping accommodations (in the case of the latter). The remaining examples arguably restrict access based on a prospective entrant's relationship to a recipient of services (e.g., a close friend or family member) rather than the sex of that person.

was in no position to create ambiguity for the purpose of achieving an end based solely on public policy considerations.

The Connecticut Supreme Court has previously been called on to address public policy considerations in the face of explicit exceptions in our state antidiscrimination statutes. In Thibodeau v. Design Group One Architects, LLC, 260 Conn. 691 (2002), a plaintiff employee alleged she was discriminated against in violation of public policy by her former employer, which had fewer than 3 employees. Id., at 694. Summary judgment was granted in favor of the employer on the ground that the remedial public policy goals of the antidiscrimination statute could not be used to circumvent the policy expressed in exempting entities with fewer than 3 employees from coverage. Id., at 695-97.

The Supreme Court agreed. While it acknowledged that "the important and salutary public policy expressed in the antidiscrimination provisions of the act cannot be overstated," it also noted that through its definitional exemption "the act also embodies a second public policy, namely, that employers with fewer than three employees shall not be required to defend against employment discrimination claims. Contrary to the urging of the plaintiff, we cannot give voice to the act's prohibitions and simultaneously ignore its exemption for small employers, for the latter operates as a limitation on the former." Id., at 709. Like the Referee's reference to Title IX; Record, 16; the Appellate Court in Thibodeau had made reference to the public policy of Title VII and other statutes in favor of eliminating sex discrimination. But such statutes, the Supreme Court concluded, "although expressive of a general public policy to eliminate sex discrimination, simply cannot trump the expression of public policy contained in the statutory scheme… that

specifically addresses discriminatory employment practices *and expressly exempts small employers from its coverage.*" (Emphasis in original.) Id., at 713.

Ultimately, the Supreme Court made clear that policymaking remains the purview not of adjudicative tribunals, but of the legislature:

> Of course, there can be no doubt that the elimination of invidious discrimination… is the overarching goal of the act. It also cannot be doubted, as we observed in *Evening Sentinel*, that our legislature is committed to that goal. But just as the primary responsibility for formulating public policy resides in the legislature… so, too, does the responsibility for determining, within constitutional limits, the methods to be employed in achieving those policy goals.

Id., at 714-15. The Court was accordingly "constrained to recognize the balance that the legislature has struck between the state's dual interest in policing and eliminating sex discrimination… on the one hand" and explicitly exempting certain circumstances from the statute's coverage, on the other. Id., at 715. It was not for the Court to tip the scales.

So too, here. "[N]o matter how sympathetic or deserving [a practice] may appear to be, it is the province of the legislature, not [an adjudicative tribunal], to determine" what conduct the statute exempts. Vincent, 285 Conn. at 792–93. "It is not the province of [the tribunal], under the guise of statutory interpretation, to legislate... a [particular] policy, even if [it] were to agree... that it is a better policy than the one endorsed by the legislature as reflected in its statutory language." Trinity Christian Sch., 329 Conn. at 697–98. Just as the Connecticut Supreme Court in Thibodeau recognized and respected the statutory exemptions to the employment discrimination statutes as the legislature's expression of policy goals, the Referee should have done the same with regard to the limited and unambiguous statutory exception for "separate bathrooms or locker rooms based on sex". Her conclusion to the contrary was prejudicial error, and warrants reversal.

VI. THE REFEREE RELIED ON EVIDENCE OUTSIDE THE RECORD.

The UAPA requires that an agency's findings of fact in contested case proceedings "be based exclusively on the evidence in the record and on matters noticed." Conn. Gen. Stat. § 4-180. The use of non-record evidence is improper and requires a remand "if a party has affirmatively shown substantial prejudice." (Emphasis added.) Connecticut Nat. Gas Corp. v. Pub. Utilities Control Auth., 183 Conn. 128, 139 (1981). An agency's "[r]eliance on extra-record evidence for important facts demonstrates [the requisite] substantial prejudice." Id., at 140. This is especially so when the agency did not give prior notice to the parties of its intent to rely on such evidence, since "[b]efore an administrative agency may lawfully rely on material nonrecord [evidence] it must allow a party adversely affected thereby an opportunity to rebut [the evidence] at an appropriate stage in the proceedings." Id., at n.9.

Case law has consistently held that evidence of customer preferences is irrelevant to the issue of whether illicit discrimination has occurred. See, e.g., Evening Sentinel, 168 Conn. at 37 ("it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid"). For the Referee, however, customer preference evidence was the cornerstone of her decision-making. She accordingly permitted, over the persistent objections of the Commission, the admission of not only documents and lay testimony as to customer preference, but evidence from a supposed expert as well. See, e.g., Record, 1082-84, 1120-21, 1155-56.

In her final decision, the Referee made reference to the customer preference evidence admitted at the hearing. Id., at 12. But she also made reference to preference-

related testimony from expert witnesses in other cases. One was Dr. Robert Tanenbaum, who testified in Livingwell and Foster, as well as in subsequent legislative hearings in Massachusetts. Id., at 15, 18 n.11. The other was Dr. Gillian Creese, who gave evidence in a Canadian case. Id., at 12-13, 17-18. The Referee relied on statistical evidence from Tanenbaum; id., at 15; and interspersed the sociological testimony of Creese with testimony from witnesses who testified in this case. Id., at 12-13. The Referee even went so far as to point out the purported qualifications of Creese, noting that she was "qualified as an expert to give evidence regarding gender and social inequality." Id., at 12 n.9.

While the parties were aware of and discussed Livingwell and Foster in their briefs, the Canadian case in which Creese gave evidence was not mentioned anywhere in the briefing. The record reflects no mention of the Canadian case at all prior to the final decision. Nor does the record reflect any notice given to the parties that Creese's evidence in the Canadian case, or Tanenbaum's testimony from Livingwell, Foster, or legislative hearings, would be considered and relied on by the Referee. While the Commission was able to discuss Livingwell and Foster in its briefs generally, it was given no opportunity to rebut the specific evidence offered by Tanenbaum or Creese; no need for such rebuttal was ever suggested prior to the final decision. Had Tanenbaum or Creese testified in person, the Commission would certainly have availed itself of the right to cross-examine them, as it did with Dr. Diane Quinn. Id., at 1186-92.[17]

"Ordinarily courts must affirm agency decisions supported by substantial evidence in the record." Connecticut Nat. Gas Corp., 183 Conn. at 140 n.10. This is often the case

[17] The Referee's statement that "the Commission was given an explicit opportunity to cross-examine the expert presented, Quinn… [but] declined to do so"; Record, 11; is therefore yet another error in the final decision.

even where there is evidence that would support a contrary outcome. See, e.g., Dufraine v. CHRO, 236 Conn. 250, 260 (1996) ("possibility of drawing two inconsistent conclusions from the evidence does not prevent… agency's finding from being supported by substantial evidence"). "The substantial evidence rule, however, does not require a court to affirm an agency decision that rests, even in part, on extra-record evidence, if the record evidence would also allow a court to affirm a contrary result had the agency so decided. This exception to the substantial evidence rule recognizes that in such circumstances any extra-record evidence credited by the agency in reaching its decision may have tipped the balance." Connecticut Nat. Gas Corp., 183 Conn. at 140 n.10.

As demonstrated in this brief, the evidence in the record still supports a finding that the Gym Defendants have engaged in a discriminatory practice that contravenes Conn. Gen. Stat. § 46a-64. The Referee should have so decided. Instead, the Referee repeatedly referenced, and materially relied on, extra-record evidence from Creese and Tanenbaum. The failure of the Referee to provide the Commission with a timely opportunity to rebut that evidence prior to issuing the final decision was procedurally unlawful, and clear error in view of the record. Such prejudicial error warrants reversal.

VII. CONCLUSION

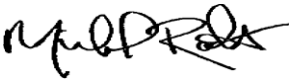
"The purpose of [civil rights statutes] is to promote integration and root out segregation, not to facilitate exclusion." Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 90 (2d Cir. 2000). "Blanket exclusions, no matter how well motivated, fly in the face of the command to individuate that is central to [non-discriminatory] practices." Connecticut Inst. for the Blind v. CHRO, 176 Conn. 88, 96 (1978). For Connecticut gyms as much as for Topeka schools, to offer "separate but equal" facilities or services along

protected class lines strikes at the heart of our nation's civil rights laws, and is fundamentally unlawful.

The Gym Defendants' practice of providing separate but supposedly-equal workout spaces has denied individuals like Daniel Brelsford and Alex Chaplin full and equal accommodation, and segregates on the basis of sex. It therefore violates Conn. Gen. Stat. § 46a-64(a). Despite the plain and unambiguous language of our public accommodation statute, the Referee went out of her way to find in favor of the Gym Defendants. In doing so she erred, prejudicially and materially.

This appeal should be sustained.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

By: 

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C E R T I F I C A T I O N

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on March 31, 2020 to all counsel and self-represented parties of record as follows, and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were or will immediately be electronically served.

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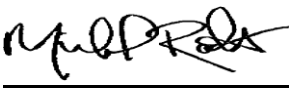

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